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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL CULVERSON,

Defendant and Appellant.

C080901

(Super. Ct. No. 15F03205)

The issues in this case are whether the People presented sufficient evidence to prove the four alleged Nevada strike priors/serious felonies of defendant Samuel Culverson. Culverson's current offense was for second-degree robbery (here, robbery of a cigarette store) while personally using a firearm. In addition, the jury also found he had four strike priors/serious felonies from Nevada. The court sentenced him to prison for 25 years to life for the robbery (because of the four prior strikes), plus 10 years to life for the personal use of a firearm, plus 20 years (five years each for the same four prior serious felonies). Defendant on appeal challenges the sufficiency of evidence to support each of

the strike priors/serious felonies. We agree that there lack sufficient evidentiary support, but we give the People the opportunity to retry them, consistent with California Supreme Court precedent.

FACTUAL AND PROCEDURAL BACKGROUND

There were four prior strikes/serious felonies alleged and found true by the jury.

The first strike was attempted robbery in 1972 in Washoe County, Nevada.

The second strike was robbery with a deadly weapon in 1977 in Washoe County, Nevada.

The third strike was second degree murder in 1991 in Clark County, Nevada.

And the fourth strike was robbery with a deadly weapon in 2000 in Clark County, Nevada.

There were three exhibits introduced to prove these four prior strikes.

Exhibit 1 was a certified California Law Enforcement Telecommunications System (CLETS) rap sheet for “Samuel Ural Culverson.”

Exhibit 2 was a certified record of conviction in case No. 88C084620 for “Samuel Culverson” regarding his guilty plea to a charge of second degree murder.

Exhibit 3 was a certified record of conviction for case No. 97C144419-2 for “Samuel E Culverson” regarding his guilty plea for a 2000 robbery with a deadly weapon, possession of a controlled substance, and felon in possession of a firearm.

DISCUSSION

I

There Was Sufficient Evidence Defendant Was The Person

Who Received The 1991 Murder Conviction

Defendant contends there was insufficient evidence he was the person who received the 1991 murder conviction. He argues that exhibit 2 lacked sufficient identifying markers to demonstrate that he was the perpetrator (he is identified as having no middle name) and had variances from his physical description (such as his height,

which is noted as six feet one inches) from other documents such as exhibit 1 that noted his height was 5 feet 10 inches.

Notwithstanding defendant's contention, there was sufficient evidence defendant received the 1991 murder conviction. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1067 [standard of review].) As to defendant's argument attempting to undermine exhibit 2 because of the variability of certain physical factors, there is no requirement of anything particular to conclusively establish identity. (*People v. Saez* (2015) 237 Cal.App.4th 1177, 1191.) What exhibit 2 established was that "Samuel Culverson" with a "Scope ID #: 175713" pled guilty in August 1991 to second degree murder in case No. "88C084620." Exhibit 3, the admissibility of which defendant does not challenge on appeal, was a certified record of conviction for "Samuel E Culverson" with a "Scope ID #: 175713" for a 2000 robbery with a deadly weapon that also showed a conviction of felon in possession of a firearm, with the underlying felony being a conviction for second degree murder in case No. "C84620." Taken together, this evidence was sufficient to establish the same Samuel Culverson here received the 1991 second degree murder conviction.

II

There Was Insufficient Evidence As To The Remaining Three Strikes/Serious Felonies; The People Are Permitted To Retry Them

Defendant on appeal challenges the remaining three Nevada strike convictions (attempted robbery in 1972, robbery with a deadly weapon in 1977, and robbery with a deadly weapon in 2000). The People concede there was insufficient evidence to prove these priors, and we agree.

Robbery and attempted robbery are strike offenses under California law. (Pen. Code, § 1192.7, subd. (c)(19) & (c)(39).) The California Penal Code defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen.

Code, § 211.) Nevada’s statutory definition of robbery differs from California in two important respects for the purposes here. “First, under Nevada law, robbery requires only *general* criminal intent [citations], whereas under California law, robbery requires a specific criminal intent to permanently deprive another person of property [citation]. Second, under Nevada law, a taking accomplished by fear of future injury to the person or property of *anyone in the company of the victim at the time of the offense* qualifies as robbery [citation], whereas under California law such a taking does not.” (*People v. McGee* (2006) 38 Cal.4th 682, 688.) “In view of the foregoing distinctions between the elements of robbery under California law and those under Nevada law, it was at least theoretically possible that defendant’s Nevada convictions involved conduct that would not constitute robbery under California law.” (*Ibid.*) Thus, although California robbery convictions and attempted robbery convictions are strikes in California, we have no evidence that these Nevada convictions were.

Nor did the fact that defendant’s robbery convictions were “with a deadly weapon” provide sufficient evidence of a strike/serious felony. To qualify as a strike/serious felony, there must be evidence that during the commission of the robbery defendant “personally used a dangerous or deadly weapon.” (Pen. Code, § 1192.7, subd. (c)(23).)

Defendant asserts that he is entitled to resentencing. But consistent with California Supreme Court authority, we remand the matter for possible retrial on the priors, which is not barred by double jeopardy principles. (*People v. Barragan* (2004) 32 Cal.4th 236, 241.) “In determining whether an out-of-state conviction qualifies as a prior serious felony conviction under California law, the trier of fact may look to the entire

record of the conviction but no further.” (*People v. Woodell* (1998) 17 Cal.4th 448, 450-451.)¹

DISPOSITION

The findings that defendant’s prior Nevada convictions for attempted robbery in 1972, robbery with a deadly weapon in 1977, and robbery with a deadly weapon in 2000 were for serious felonies within the meaning of the three strikes law is reversed, and the three five-year enhancements imposed for those prior convictions are stricken.

If the People elect to retry the strikes allegations, the trial court shall resentence defendant following retrial. If, within 60 days after the remittitur issues from this court, the People have not filed and served an election to retry the strike allegations, the trial court shall dismiss the strike and serious felony allegations for these three priors and resentence defendant.

In all other respects, the judgment is affirmed.

/s/
Robie, Acting P. J.

We concur:

/s/
Murray, J.

/s/
Hoch, J.

¹ For purposes of this opinion, we need not address which specific documents the People may use on possible retrial.